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September 1, 2016

VIA US MAIL AND E-FILING

Kurt A. Schroeder
Chief – Consumer Policy Division
Josh Zeldis
Deputy Chief – Consumer Policy Division
Nancy Stevenson
Deputy Chief – Consumer Policy Division
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Presentation – In relation to Kohll's Pharmacy and Homecare Inc.'s Petition for Declaratory Relief and Waiver, FCC No. 02-278

Dear Mr. Schroeder, Mr. Zeldis and Ms. Stevenson:

On August 30, 2016, I met with you in relation to Kohll's *Petition for Declaratory Relief and Waiver* ("Petition"). During our meeting we discussed the following points:

- The facsimile which resulted in a lawsuit brought by Ballard Nursing was a one-time facsimile sent by Kohll's on March 3, 2010, in response to a H1-N1 flu update sent to Kohll's by the CDC.
- It is undisputed that the CDC periodically urged pharmacies such as Kohll's educate the public and businesses relative to the availability of flu shots.
- Screen shots of the CDC's website in 2009 and 2010 identify the importance of individuals and businesses to obtain flu shots.¹
- Kohll's has determined of the 4,142 transmitted facsimile, 577 were sent to existing customers/clients of Kohll's.
- The facsimile in question (copied onto this letter) contained compliant opt-out language.
- No business contacted Kohll's to opt-out of future facsimiles (and no further faxes of this nature were sent).
- Briefing for summary judgment in state court cause of action is complete.

¹ I also indicated that in the process of attempting to locate the precise literature that was sent by the CDC to Kohll's.

- Plaintiff in the underling action, Ballard Nursing, is seeking a \$6,200,000 class action based judgment based on treble damages (\$1,500 per facsimile).

We also discussed the following bolded topics in detail:

Whether the Facsimile is an Advertisement

When we discussed the nature of the facsimile, I acknowledged that the facsimile contained a price per shot/per employee. However, I indicated that the price notation is incidental to the total *informational message* provided. As reflected by the attached facsimile, the main purpose of the facsimile was to inform large businesses that they provide flu shots to their employees (on site) rather than face the costs of absent/sick employees. As I explained, the facsimile was sent during the H1-N1 pandemic. And as I explained, for this *informational message* to be understood, it was necessary for Khol's to identify and contrast the costs of absent/sick employees with the relatively inexpensive costs of flu shots. I argued that the inclusion of the price does not render the facsimile an advertisement. The largest font of the facsimile reads as follows²:

CORPORATE FLU SHOTS

Only \$16-20 per vaccination

And while the price is in large font, in what can be described as a medium sized font, the facsimile informed businesses that:

10 employees sick with the flu cost you \$877.10

Each flu infection costs you 3-5 days missed work days and
up to 2 weeks of low productivity

And in a somewhat larger and bolded font, another portion of the facsimile states:

How much is the flu REALLY costing your Company?

Protect your assets! Vaccinate your employees

It is Khol's position that the price is incident (but necessary) to the over-all message - that vaccinations help protect employees for the expenses related to sick employees.

² The fonts constitute my best faith estimate to approximate the sizes of the fonts on the letter.

Notably, the record does not show that Khol's in any way profited from the facsimile in question. Accordingly, while Plaintiff's counsel has urged the FCC to declare that the facsimile constitutes an "advertisement", other than the Plaintiff Ballard Nursing, none of the purported 4,141 recipients complained that it was an unlawful advertising facsimile or otherwise opted out. For these reasons, the FCC should declare the facsimile was an *informational* facsimile which was transmitted while the United States was facing the H1-N1 pandemic of 2009-10.

FCC Should Create a Retroactive Exception for Health Related Faxes

I also discussed that the FCC should create an exception for health-care related facsimiles similar to the health-care exceptions for auto-dialed and/or pre-recorded messages to cell phones. While I recognize that the FCC (to date) was only authorized to make exceptions to cell phones, I noted that the Petition argues that denial of a similar exception to facsimiles would violate the First Amendment. I should also add that the current FCC exceptions for cell phones specifically allow for flu shot reminders. See the Petition for further argument. Given the crippling damages at stake, my client may have to pursue additional relief at the Circuit Court level if an exception is not granted and grandfathered in.

FCC Should Issue a Waiver to Khol's For its Good Faith Conduct

Lastly, I discussed why a waiver is appropriate under the circumstances. As I explained, similar to the confusion which supported the opt-out notice waiver, a similar confusion appears to exist to the extent Khol's is one of many health care related entities which have been sued for transmitting health care related facsimiles, despite Khol's belief that the facsimile was lawful. The Petition identifies a few examples of other health care facsimiles which have been subject to litigation. It was not unreasonable for Khol's to believe that a healthcare exception would eventually apply to healthcare related messages and to facsimile based message in particular.

Here, a waiver is appropriate, because in viewing the four-corners of facsimile, a colorable and good faith argument exists that the facsimile was not an advertisement despite the identification of the cost of the shot. (See my above argument regarding the informational nature of the facsimile.) Given the CDC's heavy promotion of vaccination in light of the H1N1 pandemic (and the CDC's current promotion of flu shots), it was not and is not unreasonable for Khol's to believe that the facsimile was lawful based upon the *informational message* contained in the four corners. This argument is supported by the fact that Khol's sent close to 600 faxes to existing customers with the purpose of *informing* these clients of the costs of sick employees. The *informational* nature of the facsimile is supported by the comments of support that are contained in the record (which we discussed during our meeting).

Finally, a waiver is appropriate because Khol's otherwise complied with the TCPA by including opt-out language. The inclusion of opt-out language demonstrates that Khol's was aware of the TCPA and believed that the facsimile was lawful. This position is bolstered by the undisputed fact that the CDC heavily promoted flu shots and provided Khol's with literature which led Khol's to create and transmit the subject facsimile.

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Thank you very much for meeting me to discuss my client's Petition. **While I recognize that you have many matters to deal with, time is of the essence because the motion for summary judgment is fully briefed.**

If you have any questions, please contact me.

Very truly yours,

x James C. Vlahakis

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JCV:ran

cc: Mark Stone, Deputy Bureau Chief

3/3/10 15:25

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HR Exec

1/1

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